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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

Docket No. 677

GREAT COVE REALTY CO., INC., and DEVONSHIRE CONSTRUCTION CORP.,

Appellants,

against

HARRY C. BRENNER, District Attorney of the County of Suffolk, and TRUSTEES OF THE SHINNECOCK INDIAN TRIBE,

Appellees.

APPEAL BY GREAT COVE REALTY CO., INC., AND, FROM THE DETERMINATION OF THE APPELLATE DIVISION OF THE SUPREME COURT, STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

NOTICE OF MOTION TO DISMISS APPEAL, AFFIDAVIT AND BRIEF IN SUPPORT THEREOF.

JOHN P. COHALAN, JR.,
District Attorney of Suffolk County, State of New York, for Appellees,
Riverhead, N. Y.

On the Brief:
HAROLD ASHARE,
MARVIN B. ASHARE.

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Appellees.

Notice of Motion to Dismiss Appeal.

Sirs:

PLEASE TAKE NOTICE, Harry C. Brenner (formerly) District Attorney of the County of Suffolk, and Trustees of the Shinnecock Indian Tribe, appellees herein, upon all the proceedings heretofore had herein, and upon the affidavit of John P. Cohalan, Jr., District Attorney of Suffolk County, State of New York, sworn to March 4, 1961, do hereby apply to this Court for an Order dismissing the appeal herein upon the grounds that the appeal does not raise any new or novel question of law in this Court, and for the further reason that no constitutional question is presented within the provisions of the law relating to review in the United States Supreme Court, and for such

other and further relief as may be just and proper in the premise.

Dated: March 4, 1961.

JOHN P. COHALAN, JR.,
District Attorney of Suffolk County, State of New York, For the Appellees, Harry C. Brenner (formerly) District Attorney of Suffolk County and Trustees of the Shinnecock Indian Tribe.

ARTHUR KARGER,
Counsel for Appellants,
1271 Avenue of the Americas,
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Co-Counsel:

MORRIS PERMUT,
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New York 38, New York.

Affidavit of John P. Cohalan, Jr., in Support of Motion to Dismiss.

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GREAT COVE REALTY CO., INC., and
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Appellees.

STATE OF NEW YORK }
COUNTY OF SUFFOLK } ss.:

JOHN P. COHALAN, Jr., being duly sworn, deposes and says:

That he is the District Attorney of Suffolk County, State of New York. That this proceeding was instituted in the County Court of Suffolk County, State of New York, by a former District Attorney of the County of Suffolk, Hon. Harry C. Brenner. Such proceeding was instituted on October 13, 1954, pursuant to the provisions of Section 8 of the Indian Law of the State of New York. That the proceedings sought to obtain an order to remove the respondents-appellants and the other respondents from certain lands of the Reservation of the Shinnecock Tribe of Indians upon the ground that they are intruders and are improperly in possession of such property.

Affidavit of John P. Cohalan, Jr., in Support of Motion to Dismiss.

The respondents-appellees, Great Cove Realty Association, Inc. and Devonshire Construction Corp. interposed an answer to the complaint by Morris Permut, Esq., their attorney. An answer was likewise interposed by Joseph V. McKee on behalf of the respondents, Realty Associates, Inc.

The matter was tried in the County Court by the then Acting County Judge and Surrogate, Hon. Edgar F. Hazelton. After an extended trial, it was determined that the complainant-appellees were entitled to the possession of the premises, and an order was entered on March 4, 1955 directing a warrant to issue to the Sheriff of Suffolk County to remove the respondents from the premises which are situate in the Town of Southampton, County of Suffolk, State of New York, and determined the specific lands which were owned and should be occupied by the Shinnecock Tribe (pp. 24-28 of the record). It was also specifically stated and agreed between the attorneys for the appellants and the respondents, and the District Attorney, that the Court had jurisdiction to hear and determine the issues presented (ff. 110 and 111 of the record). The question of jurisdiction had been conceded on the record in the County Court. Such jurisdiction has been considered and approved in similar matters in this Court.

The problem of constitutionality of Section 8 of the Indian Law has likewise been determined by this Court. The respondents-appellees have had an opportunity to determine the issues of title as well as the right of possession to the premises in question in the County Court of Suffolk County, and have been accorded due process of law.

Affidavit of John P. Cohalan, Jr., in Support of Motion to Dismiss.

It would also appear that the Tribe of Shinnecock Indians may not specifically have been included within the limitations, if any, of Section 233 of Title 25 of the United States Code. The problems or questions of jurisdiction were not presented in the Court of original jurisdiction, and accordingly should not properly be heard or determined in this Court after the entry of judgment and a determination in the Appellate Division. The litigation in question should not be continued indefinitely. The appellants have had an opportunity to review the subject of the judgment on two occasions in the Appellate Division of the Supreme Court of New York, Second Judicial Department and once in the Court of Appeals, and again on two occasions in connection with motions for leave to appeal.

It is respectfully submitted that the appeal herein should be dismissed.

JOHN P. COHALAN, JR.,
District Attorney, Suffolk County,
State of New York.

Sworn to before me this
4th day of March, 1961

HAROLD ASHARE
Notary Public, State of New York
No. 52-5114800—Suffolk County
Term Expires March 30, 1962

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Appellees.

BRIEF OF APPELLEES IN SUPPORT OF APPLICATION TO DISMISS.

(Reference to folios and pages are from the Record on Appeal in the Court of Appeals)

Appellants herein have appealed to this Court by notice of appeal dated October 3, 1960. They have filed a Jurisdictional Statement which includes a summary of the questions presented and argument and memorandum in support of their contention that this Court should review the order from which said appellants have appealed.

Appellees will not repeat the determinations and opinions of the lower Courts and of the various orders of the lower Court, as the same are set forth in detail in the jurisdictional statement filed heretofore by the appellants.

The order of the County Court of Suffolk County, State of New York, was unanimously affirmed on July 1, 1957 by the Appellate Division of the Supreme Court (pp. 853, 854 of the record in the Court of Appeals).

Appellants' application for leave to appeal was denied on February 27, 1958 in the Court of Appeals of the State of New York upon the ground that the appellants could appeal to that Court as a matter of right by reason of a constitutional question having been raised within the meaning of Section 592, subd. 5a of the Civil Practice Act of the State of New York (pp. 853, 854 of the record).

It would appear to the appellees that there is no constitutional question which concerns jurisdiction or violations of constitutional rights presented by this appeal. That the questions preseated are not novel or new, since they have been determined by this Court heretofore and for the further reason that the appellants have not only consented to the jurisdiction of the Trial Court, but have, in open Court and upon the trial, consented to the jurisdiction of the County Court of Suffolk County.

Section 8 of the Indian Law in the State of New York is quoted in detail, as is Section 5 (pp. 4, 5, and 6 of the Jurisdictional Statement filed by the appellants).

The County Court of Suffolk County, State of New York, Has Jurisdiction to Hear and Determine the Issues, and Appellants Consented to such Jurisdiction.

When this matter was presented to the County Court of Suffolk County for consideration, the Trial Court recognized the possible problems presented insofar as the questions of jurisdiction were concerned. At folios 110 and 111 of the printed record the following appears concerning this subject:

> "The Court: Now, there is not going to be raised here, I take it, any point involving the question of

whether or not the procedure pursued by the District Attorney is the proper procedure, is that correct?

"Mr. Permut: No question on that.

"Mr. O'Malley: No.

"The Court: Because I don't want to waste a lot of time and money taking proof, and then have a question of jurisdiction or a procedural question raised. If such a question were to be raised, I would pass upon that as we do in the Surrogate's Court, preliminarily, and then move on to the matters of substance.

"Mr. Permut: There is no question on that score on behalf of my defendants."

Notwithstanding the statement by appellants that they were satisfied with the jurisdiction of the Court to hear and determine the matter, the question of the jurisdiction was raised after the completion of the trial and considered by the Trial Judge. The Trial Court had this to say about this subject (ff. 64, 65 of the record):

"Nevertheless, in spite of what they unquestionably had agreed to, defendants, after the close of this case, moved to dismiss the proceedings upon the ground that the Court lacked jurisdiction. In the event defendants had chosen to change their position anent jurisdiction after they had consented to same, they should have done so at the earliest possible time, and not have waited until the taking of testimony had ended. Such a stratagem fails utterly to impress this Court."

The Court of Appeals of the State of New York, opinion by Froessel, J., 6 N. Y. 2d 435, 160 N. E. 2d 826 (see pp. 32 and 33 of the Jurisdictional Statement), had this to say concerning that subject:

"Appellants had a full dress trial on the issue of ownership, and their contention that the court

was obliged to dismiss the proceeding as soon as the evidence showed a genuine dispute as to title to the parcel, is untenable.

"As to the alleged constitutional right to a jury trial on the issue of title, we do not reach the merits of this claim, as appellants are estopped by their conduct from asserting it. At the very outset of the trial, it clearly appeared—by stipulation—that the principal issue in the case was a dispute as to ownership. Thereafter, upon the court's own inquiry, the defense attorney assured the court that his clients had no objection to the procedure pursued by the District Attorney. The court pointed out that it did not 'want to waste a lot of time and money taking proof, and then have a question of jurisdiction or a procedural question raised', and the defendant attorney replied: 'There is no question on that score on behalf of my defendants.'

"While it is well settled that parties may not by their consent confer jurisdiction over the subject matter on a court (Meyers *v.* American Locomotive Co., 201 N. Y. 163, 166; Shea *v.* Export SS Corp., 253 N. Y. 17, 21), the right to a trial by jury is a personal right which must be timely asserted. Since appellants consented to have the issue of ownership tried by a court of competent jurisdiction and participated actively on the merits, they cannot now be heard to complain (Baird *v.* Mayor, 74 N. Y. 382; Security Discount Associates *v.* Weissbaum, 283 App. Div. 920)."

It would seem that the appellants should not consent to the jurisdiction and the authority of the Court to hear and determine the matter, and then raise this very issue when it appears they are unsuccessful in the Trial Court.

The constitutionality of Section 8 of the Indian Law, and the procedure therein, has been approved by this Court, see *People ex rel. Cutler et al* v. *Dibble*, 16 N. Y.

203 at 213, and affirmed in the United States Supreme Court, 21 How. 366, 16 L. Ed. 149, 62 U. S. 366. The *Dibble* case is also authority for the proposition that Section 8 of the Indian Law was designed to prevent individual citizens from obtaining possession of Indian land, "under any claim or pretense whatever without the sanction of the Government". It was the intention of the provision of the Indian Law to eliminate, if possible, the slow and tedious process of an action at law to recover real property (at p. 213 of the *Dibble* case).

Article I, Section 13 of the Constitution of the State of New York provides that all purchases of Indian lands by individual citizens are void, "unless made under the authority and with the consent of the legislature (New York)."

The Provisions of the United States Code, Section 233, Title 25, was not Intended to Include the Shinnecock Indian Tribe.

A reading of the House and Senate Reports relating to that legislation (see Senate Report No. 1836; House Reports Nos. 2720, 3040, 81st Congress, 2nd Session, 1950) indicates very clearly that it was intended to benefit the seven Indian tribes which are currently under Federal supervision in New York State, viz., the Senecas, the Tonawandas, the Tuscaroras, the Onondagas, the St. Regis Indians, the Oneidas and the Cayugas. Nowhere in the Congressional documents do we find any reference to the two still surviving Long Island tribes: the Shinnecocks and the Poospatucks.* Those two tribes have never been subject

* For one of the last episodes in the history of the Montauks, see *Johnson* v. *Long Island R. R. Co.* (1900), 162 N. Y. 462.

to any Federal jurisdiction or supervision, nor has any treaty ever been concluded between them and the Federal government, as was done at various times with the seven upstate tribes named above.

Section 233 of Title 25 of the United States Code was enacted for the purpose of allowing members of the upstate Indian tribes to obtain redress in the civil courts of New York State for any wrongs inflicted upon them without first having to sue in a peacemakers' court or other tribal tribunal, wherever such exists. In furtherance of that intent, the New York Legislature, soon after Section 233 became effective, amended Section 5 of the Indian Law so as to eliminate from it the exception previously contained therein of cases triable in the peacemakers' courts.

Still another indication that 25 U. S. C., Sec. 233 has no relevancy to the present appeal can be seen in the language of the act itself, which provides that "* * * nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe or band of Indians of any lands within any Indian reservation in the State of New York".

Section 233, Title 25 of the U. S. Code was never intended to require a trial *de novo* in a Court of another jurisdiction of the subject of boundary lines, and thus subject the appellees to further litigation.

In *Seneca Nation* v. *Christie* (1891), 126 N. Y. 122, aff'd 160 U. S. 283 that Court was called upon to decide whether grants of Indian lands within the State of New York could validly be made to individuals under the authority of the state, without the consent of Congress. In holding that such grants were valid, this Court, speaking unanimously per Andrews, J., said (126 N. Y., at p. 137):

"The original states, before and after the adoption of the Federal Constitution, assumed the right of entering into treaties with the Indian tribes for the extinguishment and acquisition of their title to lands within their respective jurisdictions. They exercised the power, which had before been vested in the crown, to treat with the Indians, and this they did independently of the government of the United States. This was notably true of the State of New York. * * *"

Then, after reviewing in detail the many treaties made between the State of New York and the Indian tribes residing within its borders, most of which had been entered into without specific authorization from Congress, this Court went on to say (126 N. Y., at p. 140):

"* * * The practical construction given by the State of New York to the Federal Constitution, as shown by the numerous treaties made by it with the Indian tribes, and the recognition by the federal authority of their validity is very strong evidence that the clause in the Federal Constitution prohibiting the states from entering into treaties, does not preclude a state having the preemption right to Indian lands, from dealing with the Indian tribes directly, for the extinguishment of the Indian title. Such a dealing is not a treaty in the constitutional sense, and is not inconsistent with the exercise by the United States of its general jurisdiction for the protection of the Indians in their right of occupancy of their lands. * * *"

To the same effect, as to the Shinnecocks, see Op. Atty. Gen. (N. Y.) (1934), pages 285, 288.

The paramount right to extinguish Indian rights by purchase which the Colony and later the State of New York

acquired upon declaring its independence from the British Crown was never surrendered to the Federal government. The efforts of the appellants to inject Federal questions at this stage of the proceedings should be rejected.

The subject of the power of the State of New York to legislate concerning Indian affairs and property, and the constitutionality of such legislation, have been tested and determined by this Court heretofore. The principles of law enunciated by the majority opinion of the Court of Appeals in this very matter have been considered and supported by this Court as follows:

> *People ex rel. Cutler* v. *Dibble*, 16 N. Y. 203, Affirmed 62 U. S. 366;
> *Seneca Nation of Indians* v. *Christie*, 126 N. Y. 122, 160 U. S. 283, 40 L. E. 970, 16 S. Ct. 328.

The above determinations were also reaffirmed in *St. Regis Tribe of Mohawk Indians* against *The State of New York*, 5 N. Y. 2d 524, 177 N. Y. S. 2d 289, at pp. 299, 300 and 301. Application for writ of certiorari was denied in this Court, 359 U. S. 910 and 1146, 79 S. Ct. Reporter 586 and 1146.

In *Williams* v. *Lee*, 358 U. S. 218, 79 S. Ct. 269, this Court quoted the following at p. 221, Note 6, concerning the subject of jurisdiction of the State of New York in civil and criminal matters:

> "See, e. g., 62 Stat. 1224, 64 Stat. 845, 25 U. S. C. Sections 232, 233, 25 U. S. C. A. Sections 232, 233 (granting broad civil and criminal jurisdiction to New York); 18 U. S. C. Sec. 1162, 18 U. S. C. A. Sec. 1162, 28 U. S. C. Sec. 1360, 28 U. S. C. A. Sec. 1360 (granting broad civil and criminal jurisdiction to California, Minnesota, Nebraska, Oregon, and Wisconsin). The series of statutes granting extensive

jurisdiction over Oklahoma Indians to state courts are discussed in Cohen, Federal Indian Law—Revision by the United States Interior Dept. 1958."

Conclusion.

The motion to dismiss this appeal should be granted.

Respectfully submitted,

JOHN P. COHALAN, JR.,
District Attorney, Suffolk County,
State of New York, for Appellees.

On the Brief:

HAROLD ASHARE, and
MARTIN B. ASHARE.